4

No. 309

Office - Supreme Court,
FILED
AUG 29 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

R. W. ELLER, ADMINISTRATOR OF THE ESTATE OF MIT BROWN, DECEASED, *Petitioner,*

v.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS M. COOLEY, II
EDW. EVERETT RICE
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	2
Specification of Errors	3
Reasons for Granting the Writ	3
Conclusion	8

TABLE OF AUTHORITIES.

CASES:

Affolder v. *New York C. & St. L. R. Co.*, 339 U. S. 96	7
Carter v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U. S. 430	7
Cooper v. *Brown*, 126 F 2d 874	4
Crockett v. *United States*, 116 F 2d 646	4
Erie R. Co. v. *Tompkins*, 304 U. S. 64	4
Galloway v. *United States*, 319 U. S. 372	3
Gorham v. *Mutual Ben. Health & Accident Ass'n.*, 114 F 2d 97	4
Gutierrez v. *Public Service Interstate Transportation Co.*, 168 F 2d 678	4
Howell Turpentine Co. v. *Commissioner of Internal Revenue*, 162 F 2d 319	3
Johnson v. *United States*, 333 U. S. 46	7
Laidlaw v. *Sage*, 158 N. Y. 73	6
Lavender v. *Kurn*, 327 U. S. 645	7
Louisville & N. R. Co. v. *Marshall's Adm'x.*, 289 Ky. 129	3
McCrate v. *Morgan Parking Co.*, 117 F 2d 702	4
Moore v. *Chesapeake & O. Ry. Co.*, 340 U. S. 573	7
Moore v. *Chicago, B. & Q. R. Co.*, 28 F. Supp. 804	4

Page

Moran v. *Pittsburgh-Des Moines Steel Co.*, 166 F 2d 908 4
Nolley v. *Chicago M., St. P. & P. R. Co.*, 183 F 2d 566 ..... 4, 5
Northern Liquid Gas. Co. v. *Hildreth*, 180 F 2d 330.. 4, 5
Ristucci v. *Norfolk & Westren Ry. Co.*, 60 F 2d 28.. 3, 6
Stoner v. *New York Life Ins. Co.*, 311 U. S. 464 4
Southern Ry. Co. v. *Walters*, 284 U. S. 190 .....3, 5, 6
Sullivan v. *Boone*, 205 Minn. 437 6
Weeks v. *McNulty*, 101 Tenn. 495 6
Wilkerson v. *McCarthy*, 336 U. S. 53 7

STATUTES:

28 U.S.C. sec. 1254 (1) 2
Ky. Rev. Stat's. 277.190 2

MISCELLANEOUS:

3 Moore's Federal Practice section 38.02 (1948 Cum. Supp.) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ————

R. W. ELLER, ADMINISTRATOR OF THE ESTATE OF MIT BROWN, DECEASED, *Petitioner,*

v.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Appellee below, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on June 10, 1952.

OPINIONS BELOW

The judgment of the District Court and its order denying a motion to set aside the verdict (R. 26, 27) are unreported. The opinion of the Circuit Court of Appeals (R. 127-131) has not yet been published in the Federal Reporter.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 10, 1952 (R. 125). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

Whether the Circuit Court of Appeals erred in relying on Federal instead of State law, in drawing inferences properly left to the jury in the Trial Court and in reversing the judgment of the District Court entered upon the jury's verdict.

STATUTE INVOLVED

Kentucky Revised Statutes 277.190.

STATEMENT OF THE CASE

Plaintiff's decedent was struck and killed by the locomotive of Defendant's train (R. 73-76) at an unlighted intersection (R. 48, 56, 57) of defendant's railroad and a highway. The negligence charged was that defendant's train did not give warning, as required by Kentucky statute (R. 13), by whistling for the intersection or by ringing its bell. Pursuant to proper instructions (R. 117-122)—acquiesced in by defendant's attorneys (R. 122)—the jury found in plaintiff's favor (R. 122) after the District Court had denied defendant's motion for directed verdict (R. 101). The District Court denied also defendant's motion to set aside the verdict (R. 27).

Defendant appealed to the Circuit Court of Appeals for the Sixth Circuit; and the latter Court reversed on the grounds: a) of an inference it drew from the testimony which conflicted with one apparently drawn by the jury (R. 129) and b) of its conclusion, based exclusively on Federal precedent, and contrary to applicable State precedent that the absence of warning could not have been a causative factor in the injury to plaintiff's decedent (R. 130).

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in relying exclusively on Federal cases and ignoring applicable State law.
2. The Circuit Court of Appeals erred in invading the proper function of the jury by:
   a) substituting its inferences of fact for those apparently drawn by the jury, and
   b) substituting its conclusion as to causation for that reached by the jury.
3. The Circuit Court of Appeals erred in misapplying a rule of causation established by this Court.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in justifying reversal cited four cases: *Ristucci* v. *Norfolk and Western Ry. Co.*, 60 F 2d 28; *Southern Ry. Co.* v. *Walters*, 284, U. S. 190; *Galloway* v. *United States*, 319 U. S. 372, and *Howell Turpentine Co.* v. *Commissioner of Internal Revenue*, 162 F 2d 319, and relied primarily on the *Walters* case stating: "We follow the disposition there made." (R. 130). It cited no State cases relating to the ground on which it reversed—i.e., that there was insufficient evidence to go to the jury—despite the facts that there is in Kentucky the usual mass of authority on what quantum of evidence warrants submission to the jury and that a case substantially on all fours with the instant one was recently decided in which the highest court of Kentucky reached a conclusion diametrically opposed to that of the Circuit Court of Appeals here: *Louisville & N. R. Co.* v. *Marshall's Adm'x*, 289 Ky. 129, 133-4 (1942).

(a) In thus ignoring applicable State decisions and applying Federal law to reverse the ruling of the court below that a case for the jury had been made, the Circuit Court of Appeals for the Sixth Circuit came into direct conflict

with a well-established line of cases both in this Court and in other Circuits, as well as with a previous Sixth Circuit case, holding that the rule in *Erie R. Co.* v. *Tomkins,* 304 U. S. 64, requires the issue as to the quantum of evidence necessary to permit submission to a jury to be determined by the law of the appropriate state: *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464, 467-8; *McCrate* v. *Morgan Parking Co.,* 6 Cir. 117 F 2d 702, 705; *Cooper* v. *Brown,* 3 Cir. 126 F 2d 874, 877; *Moran* v. *Pittsburgh-Des Moines Steel Co.,* 3 Cir. 166 F 2d 908, 917-8; Cert. den. *Pittsburgh-Des Moines Steel Co.* v. *Moran,* 334 U. S. 846; *Gutierrez* v. *Public Service Interstate Transp. Co.,* 2 Cir. 168 F 2d 678, 679-680; *Northern Liquid Gas Co.* v. *Hildreth,* 8 Cir. 180 F 2d 330, 336; *Nolley* v. *Chicago M. St. P. & P. R. Co.,* 8 Cir. 183 F 2d 566, 572.

The Sixth Circuit is not alone in misapprehending this rule. Holdings explicitly to the contrary appear in *Gorham* v. *Mutual Ben. Health & Accident Ass'n.,* 4 cir. 114 F 2d 97, 99-100; cert. den. 312 U. S. 688; *Crockett* v. *United States* 4 cir. 116 F 2d 646, 650; cert. den. 314 U. S. 619; and see *Moore* v. *Chicago B. & Q. R. Co.* 28 F. Supp. 804, 806 (D. C. W. D. Mo.). Thus, the Fourth and Sixth Circuits are in direct conflict with the Second, Third and Eighth Circuits and with this Court.

The confusion,[1] evidenced by the instant case and resulting from this direct conflict among the circuits is one which this court should resolve by issuing the writ of certiorari sought here and reversing the court below.

(b) If this Court should conclude that the law of Kentucky is not directly opposed to the holding of the Court of Appeals for the Sixth Circuit, the action of the latter court in reversing the District Court conflicts with another well established line of cases in another circuit which holds that the District Court's determination of local law will not be disturbed unless plainly erroneous: *Northern Liquid Gas*

[1] As to the fact that such confusion persists despite the decision in *Stoner* v. *New York Life Ins. Co.,* 311 U.S. 464 *supra,* see 3 Moore's Federal Practice, Section 38.02, 1948 cum. supp. p. 28.

Co. v. *Hildreth,* 8 cir. 180 F 2d 330, 336, *supra*; *Nolley* v. *Chicago M. St. P. & P. R. Co.,* 8 cir. 183 F 2d 566, 572, cert. den. 340 U. S. 913, *supra,* and cases cited.

On this point, also, certiorari should issue to resolve the conflict among circuits raised by the instant case.

2. Even if this Court determines that it was proper for the Court below to dispose of the case on the basis of Federal law, the writ should issue to correct a patent misapplication of this Court's decision in *Southern Ry. Co.* v. *Walters,* 284 U. S. 190, *supra.*

The holding of the *Walters* case which the Court below thought relevant was that the failure of a defendant's train to stop before entering an intersection (as required by an order of the State Commerce Commission) could not be a cause of an injury incurred when plaintiff ran against the side of the passing train. This holding has no relevance to the case at bar, and, if extended to include it, will seriously confuse the law of proximate cause as applied in the Federal Courts and the well-settled rules as to the function of the jury in determining causation.

In the instant case, the negligence charged was the failure to give warning by whistle and bell as required by statute. There was evidence, which the court below did not find incredible, (1) that the required warning was not given (R. 55, 60, 64, 69) (2) that at the time of the accident a second train was passing through the intersection in a direction opposite to that of the one which injured plaintiff's decedent (R. 43); (3) that plaintiff's decedent was standing so close to the track on which the train that struck him was running that the engineer felt it necessary to warn him by whistling,[2] and also to put his locomotive brakes into "emergency" prior to the time of the impact (R. 80) and (4) that plaintiff's decedent swayed away from the

[2] Several witnesses denied that any whistle was in fact blown (R. 55, 60, 64, 69) and the jury must have so found. Nevertheless, this testimony by defendant's witness as to plaintiff's location immediately prior to the accident stands uncontradicted.

locomotive as it passed him and then fell against it (R. 80-81).

From these facts the jury was entitled to, and apparently did, conclude that defendant's failure to give the required warning was the cause of plaintiff's decedent's failure to withdraw from the tracks to a position of greater safety, and that his resulting proximity to the tracks when the locomotive rushed past him caused him to start and lose his balance or to be pulled against the train by suction or in some other manner to come in contact with the side of the locomotive. The jury also could, and apparently did, infer that, as the train which struck him approached, plaintiff's decedent was watching the other train pass by, and because of this claim on his attention and because of the noise of the other train he failed to see and hear the approach of the one which struck him.

The Court below, however, drew the contrary inference, that he "must necessarily have been aware of the approach of the train and the omitted warning signals could have added nothing to that awareness * * * ". (R. 129). Reliance was placed by the Circuit Court of Appeals upon *Ristucci* v. *Norfolk & W. Ry. Co.*, 60 F 2d 28, as holding that a jury cannot reasonably draw an inference which facts in evidence show to be a physical impossibility (R. 130). But here there were no such facts. It was plainly possible for plaintiff's decedent to be unaware, in the circumstances, of the train's approach.

Similarly, reliance on *Southern Ry.* v. *Walters*, 284 U. S. 190, *supra* is wholly misplaced. The holding in that case that failure to stop before entering an intersection cannot be a cause of plaintiff's subsequent running into the side of the train is simply an application of the elementary *sine qua non* or "but for" causation rule.[3] That rule is plainly inapplicable where, as here, the defendant's negligence con-

[3] Compare *Stacy* v. *Knickerbocker Ice Co.*, 84 Wisc. 614 (1893) and other familiar case-book examples such as *Weeks* v. *McNulty*, 101 Tenn. 495 (1898); *Laidlaw* v. *Sage*, 158 N.Y. 73 (1899); *Sullivan* v. *Boone*, 205 Minn. 437 (1939), etc.

sists of a violation of duty to warn, and it is apparent that the warning, if given, could have called attention to the peril and enabled plaintiff's decedent to avoid injury. To say, as the Court below did, that in these circumstances failure to warn *could* not be causative, is beyond reason.

It is therefore submitted that certiorari should issue here for the reasons that justified such issuance in the *Walters* case itself as well as for the purpose of correcting a clear misapplication of that case. *Cf. Johnson* v. *United States,* 333 U. S. 46, 47.

3. A further ground for issuance of certiorari here is that the decision of the Court below conflicts in principle with a long and consistent line of cases in other circuits and in this Court. These cases have been collected in an Appendix to Mr. Justice Douglas' concurring opinion in *Wilkerson* v. *McCarthy,* 336 U. S. 53, 71. See also *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.,* 338 U. S. 430; *Affolder* v. *New York C. & St. L. R. Co.,* 339 U. S. 96; *Moore* v. *Chesapeake & O. Ry. Co.,* 340 U. S. 573. This line of authority attests the importance of the rule that the province of the jury must not be invaded either by District Courts or by Circuit Courts of Appeal. And where, as here, the invasion[4] results from misapplication of a ruling this Court itself has made, the justification for issuance of certiorari to correct the error and resolve the conflict seems apparent.

---

[4] The invasion was twofold: The Court of Appeals drew an inference of fact which was properly for the jury, *Lavender* v. *Kurn,* 327 U.S. 645; and it determined the issue of causation—also properly for the jury—, *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.,* 338 U.S. 430, 435.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS M. COOLEY, II

EDW. EVERETT RICE
Counsel for Petitioner

Sept. — 1952

5

Office - Supreme Court, U
FILED
OCT 1 1952
CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

October Term, 1952.

No. 309.

R. W. ELLER, Administrator of the Estate of Mit Brown, Deceased, - - - Petitioner,

versus

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, - Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CARL M. JACOBS,
Cincinnati, Ohio,
J. CRAIG BRADLEY,
Georgetown, Kentucky,
Counsel for Respondent.

BRADLEY & BRADLEY,
Georgetown, Kentucky,
BEN D. SMITH,
Somerset, Kentucky,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of the Case	2–4
Argument for Not Granting the Writ	4–10
Conclusion	10

CITATIONS.

Cases:

Big Sandy & K. R. Co. v. Keaton, 206 Ky. 156	5
Crockett v. United States, 116 F. 2d 97, cert. den. 314 U. S. 619	7
Erie v. Tompkins, 304 U. S. 64	6–7
Goldberg v. Chesapeake & O. Ry. Co., 211 Ky. 115.	5
Gorham v. Mutual Benefit Health & Accident Ass'n, 114 F. 2d 97, cert. den. 312 U. S. 688	7
Guardian Life Ins. Co. v. Clum, 106 F. 2d 592, 595.	7
Helm v. Louisville & N. R. Co., 17 Ky. Law Rep. 1004	5
Louisville & N. R. Co. v. Brock's Adm'r, 281 Ky. 240	5
Louisville & N. R. Co. v. Croft, 201 Ky. 803	5
Louisville & N. R. Co. v. Hyde, 239 S. W. 2d 936	5, 6, 8
Louisville & N. R. Co v. Jackson, 286 Ky. 595	5
Louisville & N. R. Co. v. Lewis, 212 Ky. 460	5
Louisville & N. R. Co. v. Marshall's Adm'x, 289 Ky. 129, 133-134	4–5
Louisville & N. R. Co. v. Mitchell's Adm'x, 276 Ky. 671	5
McCarter v. Louisville & Nashville R. Co., 236 S. W. 2d 933	6, 8

PAGE

McSweeney v. Prudential Ins. Co., 128 F. 2d 660, cert. den. 1942, 317 U. S. 658..... 7

Nolley v. Chicago M. St. P. & P. R. Co., 8 cir., 183 F. 2d 566, 572 cert. den. 340 U. S. 913..... 8

Northern Liquid Gas Co. v. Hildreth, 8 cir., 180 F. 2d 330, 335 8

Ristucci v. Norfolk & Western Ry. Co., 60 F. 2d 28-30. 9

Southern Railway v. Walters, 284 U. S. 190..... 9

Vogt's Adm'r v. Southern Ry., 161 Ky. 365..... 5

Wilkerson v. McCarthy, 336 U. S. 53-71..... 10

Zanderer v. Continental Casualty Co., 140 F. 2d 211 7

TEXTS:

Moore's Federal Practice, Vol. 5, Par. 38.10, pp. 102-104. . . .. 7– 8

Moore's Federal Practice, Vol. 5, Par. 38.10, pp. 102-103, Note 5 7

Moore's Federal Practice, Vol. 5, Par. 38.10, p. 104 8

STATUTE:

Ky. Rev. Statute, 277.190 2

IN THE

Supreme Court of the United States

October Term, 1952.

No. 309.

R. W. ELLER, ADMINISTRATOR OF THE ESTATE OF MIT BROWN, DECEASED, - - *Petitioner,*

v.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, - - - *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 127-131) is now reported in 197 F. 2d 652-655. The District Court did not render an opinion.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition on page 2.

QUESTIONS PRESENTED.

Whether the Circuit Court of Appeals erred in reversing the judgment of the District Court entered upon the verdict:

(1) By holding that where a pedestrian must have been aware of the approach of a train the alleged failure of the train to give the statutory signal was not the proximate cause of the accident.

(2) Where the decedent was guilty of contributory negligence as a matter of law.

(3) By failing to cite State authorities in determining the sufficiency of certain evidence to raise a question of fact for a jury.

STATUTE INVOLVED.

The Statute involved is set out in the Petition on page 2.

STATEMENT OF THE CASE.

The petitioner's statement respecting the above entitled case is incomplete in that it fails to point out all the material facts. The plaintiff's decedent was 49 years of age and had lived near the railroad crossing all of his life, and was well acquainted with it (R. 36-37), and his sense of sight and hearing were good (R. 39-50). A person standing at the crossing in the night time could see the headlights on a train coming north 1,000 to 1,500 feet before it reaches the crossing (R. 44-45, 49, 99-100), the railway had double tracks,

the north bound track was on the east side (left track in picture), and south bound track on west side (right track in picture) (R. 47-51, 98-100), and there is a slight curve in the tracks south of the crossing (R. 37-38, 99-100), the decedent was killed about 10:35 P. M. (R. 79), and the headlights on the north bound train which hit the decedent did not illuminate the crossing so as to make it visible to the engineer until after it passed the slight curve 135 feet below the crossing (R. 79-80). All of the witnesses for petitioner agreed that the diesel units made so much noise they were heard by the residents at the crossing for a quarter of a mile away, and Ella Jones, sister of decedent said she lived a quarter of a mile east of the crossing and the train even shook her windows (R. 45-47, 65-66, 70), and there was evidence that two trains passed the crossing (R. 59, 61, 63), the south bound train first (R. 72). There was a conflict of evidence as to whether the statutory warning was given by the train (R. 80, 81, 91). The decedent was seen that night walking on the highway eastward toward the crossing (R. 42, 55), and later as the engine came around the curve traveling north, the engineer and fireman saw decedent standing on the highway at the crossing in a place of safety about 135 feet ahead, east of the north bound track facing the west, the front of the engine passed him and decedent swayed or fell forward into the side of the engine and was killed (R. 80-89, 91-92). There were no eye witnesses except the engineer and fireman. The respondent in its answer controverted the allegations of negligence and damages (R. 15) and pleaded and

relied upon contributory negligence on the part of the decedent to bar recovery (R. 16).

The petitioner contends the Court of Appeals reversed on the grounds: (a) of an inference it drew from the testimony, and (b) of its conclusion, based wholly on Federal precedent and contrary to State precedents (Petition, p. 2).

The respondent contends the Court of Appeals reversed the District Court on the ground that the uncontroverted evidence established that the decedent must have been aware of the approach of the train; there was no causal relation between the alleged failure of the respondent to give the statutory warning and the accident; and the alleged failure to give such statutory warning was not the proximate cause of the death.

ARGUMENT FOR NOT GRANTING THE WRIT.

The arguments presented by petitioner will be discussed in their order as presented:

1. Petitioner complains because the Circuit Court of Appeals in justifying reversal relied on four Federal cases and cited no State cases, in holding there was insufficient evidence to go to the jury, and then says (Petition, p. 3) there is in Kentucky the usual mass of authority, on what quantum of evidence warrants submission to the jury, citing Louisville & N. R. Co. v. Marshall's Adm'x, 289 Ky. 129, 133-4 (1942). This case is not in point and does not discuss the question of proximate cause. Petitioner's brief is based entirely

upon the premise that Louisville & N. R. Co. v. Marshall's Adm'x, *supra,* is the law of the State of Kentucky which is a fallacy.

The opinion of the Circuit Court of Appeals is supported by Kentucky authority. In one of its most recent decisions the Court of Appeals of the Commonwealth of Kentucky ruled that a verdict should have been directed for the defendant upon a factual situation similar to the evidence in the present case. Louisville & N. R. Co. v. Hyde, 239 S. W. 2d 936 (opinion April 17, 1951, rehearing denied June 15, 1951—publication of State reports repealed by Acts of 1950). It was there held that the failure to give the statutory warning signal was not the proximate cause of the accident.

The opinion in the above case was not reported at the time of the trial in the District Court and not available to it but was cited in respondent's brief to the Circuit Court of Appeals and considered by it.

See also Louisville & N. R. Co. v. Jackson, 286 Ky. 595; Louisville & N. R. Co. v. Brock's Adm'r, 281 Ky. 240; Louisville & N. R. Co. v. Mitchell's Adm'r, 276 Ky. 671; Louisville & N. R. Co. v. Lewis, 212 Ky. 460; Goldberg v. Chesapeake & O. Ry. Co. 211 Ky. 115; Big Sandy & K.. R. Co. v. Keaton, 206 Ky. 156; Louisville & N. R. Co. v. Croft, 201 Ky. 803; Vogt's Adm'r v. Southern Ry., 161 Ky. 365; Helm v. Louisville & N. R. Co., 17 Ky. Law Rep. 1004.

The decision of the Circuit Court of Appeals is also correct under a second rule of law established by recent decisions of the Kentucky Court of Appeals. Decedent

was guilty of contributory negligence as a matter of law when he could have seen or heard the approaching train in time to avert being struck by it had he looked and listened properly. Such contributory negligence is a bar to recovery. Louisville & N. R. Co. v. Hyde, 239 S. W. 2d 936, *supra;* McCarter v. Louisville & Nashville R. Co., 236 S. W. 2d 933.

It is true that the opinion of the Circuit Court of Appeals cites only Federal authorities but it is also clearly correct under the Kentucky authorities. Petitioner under the Kentucky decisions could not recover for two reasons:

First, respondent's failure to sound a warning was not the proximate cause of the accident.

Secondly, the decedent was guilty of contributory negligence as a matter of law.

The fact that no Kentucky case was cited in the opinion will be hereinafter discussed.

(a) The opinion of the Circuit Court of Appeals is not in conflict with the cases of this Court, or other Circuits, or a previous Sixth Circuit case, or the rule in Erie R. Co. v. Tompkins, 304 U. S. 64, but is in harmony therewith. The rule in the Erie case and the other cases cited by petitioner (Petition, p. 4) do not require the issue as to the quantum of evidence necessary to permit submission to a jury to be determined by the law of the appropriate state. The correct rule in the well established line of cases of this Court and of other Circuits hold that the elements or substantive rights of the parties must be determined by the applicable local law in a case involving only non-federal

matters, but the sufficiency of certain evidence to raise a question of fact for a jury should not be controlled by State law. Gorham v. Mutual Benefit Health & Accident Ass'n (C. C. A. 4th, 1940), 114 F. 2d 97, cert. den. (1941), 312 U. S. 688; Crockett v. United States (C. C. A. 4th, 1940), 116 F. 2d 646, cert. den. (1941), 314 U. S. 619; McSweeney v. Prudential Ins. Co. (C. C. A. 4th, 1942), 128 F. 2d 660, cert. den. (1942), 317 U. S. 658; Zanderer v. Continental Casualty Co. (C. C. A. 2d, 1944), 140 F. 2d 211; Guardian Life Ins. Co. v. Clum (C. C. A. 3d, 1939), 106 F. 2d 592, 595; also see Moore's Federal Practice, Vol. 5, Par. 38.10, pp. 102-104, and on p. 102 of the text it is said:

> "The elements of plaintiff's prima facie case, or of defendant's defense, must be determined by applicable local law in a case involving only non-federal matters. But the sufficiency of certain evidence to raise a question of fact for the jury, or for the court where trial is without jury, should not be controlled by state law."

In Moore's Federal Practices, Vol. 5, Par. 38.10, pp. 102-103, note 5, the editor in referring to some of the cases cited by Petitioner says:

> "Most, if not all of these 'contra' cases are only superficially opposed to the position stated in the text, for usually the question posed was partly as to what facts would constitute a cause of action, undoubtedly a substantive matter, and partly as to the requisite measure of proof. The distinction is important though frequently not clearly brought out in the cases. And see Parker,

> Erie v. Tompkins in Retrospect: An Analysis of its Proper Area and Limits (1949), 35 ABAJ 19, 84-85."

The same authority on page 104 says:

> "* * * the Stoner decision should be regarded as a novel application of the doctrine of the 'law of the case'."

As previously pointed out the Circuit Court of Appeals followed the substantive law of the State of Kentucky. Louisville & N. R. Co. v. Hyde, 239 S. W. 2d 936, *supra;* McCarter v. Louisville & Nashville R. Co., 236 S. W. 2d 933, *supra.*

The only question involved in the case at bar was whether there was sufficient evidence to raise a question of fact for the jury. There is no conflict of decisions evidenced by the instant case with the other decisions of this Court, or of the Sixth Circuit or other Circuits. And as hereinbefore pointed out, such question is not controlled by the State law, therefore it was not necessary for the Circuit Court to rely upon or cite State authorities. Furthermore we can find no rule or law which requires any Federal Court to cite authorities to sustain every question determined.

(b) The two cases cited by petitioner from the Eighth Circuit, to- wit: Northern Liquid Gas Co. v. Hildreth, 8 Cir., 180 F. 2d 330, 336, *supra;* Nolley v. Chicago M. St. P. & P. R. Co., 8 Cir., 183 F. 2d 566, 572, cert. den. 340 U. S. 913, *supra,* hold that the District Court's determination of local law will not be disturbed unless plainly erroneous, which are not in

point because the question determined in the instant case, was one of the sufficiency of evidence to prove a case, and not a question of local law.

2. Petitioner complains because the Circuit Court relied upon Southern Railway v. Walters, 284 U. S. 190. The case is directly in point in that a child was struck by the side of a locomotive at a grade crossing as in the case at bar and it held that a directed verdict should have been given defendant because there was no proof that the alleged negligence in failing to stop the train at the crossing or sound a warning as required by the Commerce Commission was the proximate cause of the injury.

Petitioner also complains because the Circuit Court relied on Ristucci v. Norfolk & Western Ry. Co., 6 Cir., 60 F. 2d 28-30, which held that a jury could not draw an inference from a physical impossibility. In the case at bar the undisputed evidence shows decedent had normal vision and hearing, the headlight on the engine was burning and could be seen by decedent for a distance of more than a thousand feet before reaching the crossing, and the diesel engines caused such vibrations and noise that they could have been felt and heard by decedent for more than a quarter of a mile before reaching the crossing. Thus the admitted physical situation precludes the reasonableness of an inference that decedent was unaware of the approach of the train by reason of the alleged failure to sound a whistle 50 rods before reaching the crossing, and therefore the above case is directly in point.

3. Petitioner further contends that the decision of the Court of Appeals conflicts with Wilkerson v. McCarthy, 336 U. S. 53, 71, and other cases which hold that a directed verdict should not be given where facts are in dispute and fair-minded men may draw different inferences. In the case at bar there is no proof whatever that the alleged failure of respondent to sound a statutory warning fifty rods before reaching the crossing was the proximate cause of the injury, and no facts being in dispute there was no issue for the jury.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

CARL M. JACOBS,
Cincinnati, Ohio,

J. CRAIG BRADLEY,
Georgetown, Kentucky,

Attorneys for Cincinnati, New Orleans and Texas Pacific Railway Company.

BRADLEY & BRADLEY,
Georgetown, Kentucky,

BEN D. SMITH,
Somerset, Kentucky,

Of Counsel.

October 1, 1952.